

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 10, 2007 Session

PATTI T. HEATON v. SENTRY INSURANCE CO., ET AL.

**Appeal from the Circuit Court for Rutherford County
No. 45858 Robert E. Corlew, Judge**

No. M2006-02104-COA-R3-CV - Filed January 9, 2008

In this personal injury action, the sole issue raised on appeal is whether the trial court abused its discretion when it refused to exclude the testimony of a medical expert as untrustworthy under Tenn. R. Evid. 703. We conclude that the trial court did not abuse its discretion and that the expert's opinion was based on sufficient credible facts and data to satisfy the trustworthy requirement of Tenn. R. Evid. 703. We therefore affirm the trial court judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

E. RILEY ANDERSON, SP.J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

William Kennerly Burger, Murfreesboro, Tennessee, for the appellant, Patti T. Heaton.

Dinah G. Michael, W. Stan Bennett, Murfreesboro, Tennessee, for the appellee, Tracy L. Tyler.

Allan Mark Sowell, Nashville, Tennessee, for the appellee, Sentry Insurance Company.

OPINION

I. BACKGROUND

On August 7, 2001, defendant Tracy Tyler was driving her automobile in Murfreesboro, Tennessee, and attempted a left turn onto Broad Street. As she crossed Broad Street, she struck the automobile driven by plaintiff Patti Heaton in Heaton's lane of traffic. Heaton filed suit claiming personal injuries. Defendant admitted fault for the accident. Accordingly, the only issue for the jury was whether the injuries claimed by Heaton were caused by the accident and if so, the amount of damages to be awarded.

At trial the primary dispute was whether Heaton's neck injury and later cervical spine surgery performed on January 5, 2004, were caused by the accident. After examining Heaton and reviewing her medical records, Defendant's medical expert, Dr. Martin Wagner, a neurologist, testified that the neck injury and resulting cervical spine surgery were not caused by the accident. An important

factor in his determination was that Heaton did not complain of neck pain until nine months after the accident. However, Heaton's medical expert, Dr. Garrett Powell, the neurosurgeon who performed the cervical spine surgery, testified that the injury and surgery were caused by the accident. After hearing the evidence the jury returned a verdict in favor of Heaton for \$8,795.00 despite proof that Heaton's medical bills totaled \$51,990.76, a substantial part of which was related to the cervical spine surgery.

Heaton appeals to this Court arguing that Dr. Wagner's testimony should have been excluded from evidence by the trial court pursuant to Tenn. R. Evid. 703 since Dr. Wagner admitted that he overlooked a notation in Dr. Harold Smith's medical record indicating that Heaton felt her hands were numb after the accident.

II. STANDARD OF REVIEW

In general, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn.1993). The trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused. *Id.*

McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn.1997).

III. ADMISSIBILITY OF EVIDENCE

The specific rules of evidence that govern the issue of admissibility of scientific proof in Tennessee are Tenn. R. Evid. 702 and 703. The former provides:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

And Tenn. R. Evid. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

McDaniel, 955 S.W.2d at 264.

Heaton contends that the testimony of Dr. Wagner in this case was untrustworthy since he admittedly overlooked a notation in Heaton's medical records indicating that she experienced numbness in her hands following the accident. Heaton argues that "[i]f an expert relies on unreliable foundational data, any opinion drawn from that data is likewise unreliable," *Waggoner Motors, Inc.*

v. Waverly Church of Christ, 159 S.W.3d 42, 61 (Tenn.Ct.App.2004), and accordingly contends that Dr. Wagner's entire testimony should have been excluded as untrustworthy under Tenn. R. Evid. 703.

Our courts have developed standards to apply when there is a challenge to an expert's opinion based on untrustworthiness under Tenn. R. Evid. 703. For example:

When an expert's opinion is challenged, the court is to determine whether the opinion is based on credible facts or data sufficient to provide some basis for the opinion. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn.1997). Our task is not to determine the expert's credibility or the weight to be given the evidence, but rather to review the challenged opinion and determine if it has some legally-acceptable basis from which the expert's conclusion could be rationally drawn. *Church*, 39 S.W.3d 149, 166 (citing *DeVore v. Deloitte & Touche*, No. 01A01-9602-CH-00073, 1998 WL 68985, at *9-10 (Tenn.Ct.App. Feb.20, 1998)).

Wilson v. Patterson, 73 S.W.3d 95, 104 (Tenn.Ct.App.2001).

"[T]he court may make a finding of reliability if the expert's conclusions are sufficiently straightforward and supported by a 'rational explanation which reasonable [persons] could accept as more correct than not correct.'" *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn.2002) (quoting *Wood v. Stihl*, 705 F.2d 1101, 1107-08 (9th Cir.1983)).

Although the trial court must analyze the science and not merely the qualifications, demeanor or conclusions of experts, the court need not weigh or choose between two legitimate but conflicting scientific views. The court instead must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation. *See, e.g., Joiner*, 78 F.3d at 530. The trial court should keep in mind that the preliminary question under Tenn. R. Evid. 104 is one of admissibility of the evidence. Once the evidence is admitted, it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof. After that occurs, a defendant may, of course, challenge the sufficiency of the evidence by moving for a directed verdict at the appropriate times. *See* Tenn. R. Civ. P. 50. Yet it is important to emphasize that the weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact. *See Joiner*, 78 F.3d at 534-35 (Birch, J., concurring).

McDaniel, 955 S.W.2d at 265.

In this case, it is undisputed that Dr. Wagner reviewed a number of Heaton's medical records, including those of both her primary care physician Dr. Michael Helton and Dr. Harold Smith, and also conducted an independent medical examination of Heaton prior to preparing a comprehensive medical report and giving his opinions via video deposition. His opinions were tested during vigorous cross-examination by Heaton's counsel. Dr. Smith's five-page medical record stated that

Heaton was seen for a neurosurgical consultation at the request of Dr. T. Michael Helton on September 26, 2001, approximately seven weeks after the accident. The record also showed that she was seen in the Smyrna emergency room five days after the accident for lumbosacral discomfort and placed on muscle relaxants. According to the record, two days after the accident Heaton reported pain in her legs and a feeling of numbness in her hands. With respect to Heaton's neck, Dr. Smith made the following comment: "the patient has a full and painless range of motion of head and neck. She elevates both arms over her head without difficulty and places them behind her back easily". Dr. Smith's conclusion was that she had lumbago with mild change of degenerative disc tissue in her spine and did not have significant radiculopathy. He recommended medication and physical therapy.

Dr. Wagner admittedly overlooked the notation in Dr. Smith's report indicating that Heaton felt her hands were numb and did not include it in his written report. Dr. Wagner explained that he did not consider the hand numbness complaint significant because it was not accompanied by complaint of neck pain and that the first complaint of neck pain found in any of the medical records was nine months after the accident.

Dr. Wagner testified that there was a difference between subjective numbness, as related by Heaton, and objective numbness, which he indicated was a much more serious condition. In addition, Dr. Wagner testified that:

[A] spondylitic ridge with compression of a cord or compression of nerve roots will cause not just numbness in hands but will cause severe neck pain, with pain radiating down from the neck down the shoulder and down the arm and into the hand with associated numbness in that distribution, as well as perhaps weakness of the muscles of the arm or hand as well.

Dr. Wagner concluded that the notation of hand numbness in the medical record, without a complaint of radiating neck pain, made it more likely to him that the numbness was not the result of any neck pathology.

Heaton's medical expert, Dr. Garrett Powell, first saw her on September 2, 2003, more than two years after the accident. He conceded that he did not examine any of Heaton's medical records after the accident, with the exception of an MRI, and that he accepted Heaton's oral history that she suffered neck pain within hours after the accident. Heaton's version was, of course, inconsistent with the Smyrna emergency room record, the record of her primary care physician Dr. Helton, and the record of Dr. Harold Smith. Dr. Powell gave a deposition and also testified at trial. After review of the past medical records at trial, he still concluded that the automobile accident caused the neck injury and the cervical spine injury.

VI. CONCLUSION

The parties in this case presented medical testimony from two qualified experts. These experts offered competing scientific views of whether Defendant's negligence in a car accident caused Heaton's neck injury and her subsequent cervical spine surgery.

We find that Dr. Wagner's failure to recognize a single notation in Ms. Heaton's medical records did not render his entire opinion untrustworthy, rather, the failure more properly went to his credibility as a witness and to the weight afforded to his testimony. The trial court appropriately entrusted the weight and resolution of the expert's opposing views to the jury.

We have determined that the testimony of Defendant's medical expert was based on sufficient credible facts to satisfy the trustworthy requirement of Tenn. R. Evid. 703. We conclude that the trial court did not abuse its discretion when it refused to exclude the testimony of Defendant's medical expert as untrustworthy under Tenn. R. Evid. 703. The judgment of the trial court is affirmed and the costs of appeal are assessed against Appellant, Heaton.

E. RILEY ANDERSON, SP. JUDGE